

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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BAY STATE GAS COMPANY	)	D.T.E. 02-73
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MOTION OF BAY STATE GAS COMPANY  
TO STRIKE PORTIONS OF INITIAL BRIEF OF LOCAL 273

I. INTRODUCTION

Pursuant to 220 C.M.R. 1.04(5), Bay State Gas Company (“Bay State” or “Petitioner”) hereby moves to strike portions of the December 23, 2002 Brief of Local 273, Utility Workers Union of America (“Local 273”). Specifically, Bay State requests that specific portions of Local 273’s brief containing (1) references and argument based on extra-record evidence, and (2) argument wholly unrelated to the scope of this proceeding, be struck from the record of the case. In support of its request, Bay State states the following.

II. ARGUMENT

Bay State requests that the Department strike from the record portions of page 2 of Local 273’s Brief. Specifically, Bay State requests that the Department strike the discussion concerning unsworn testimony presented by a member of Local 273 at the public hearing in this proceeding. Bay State makes this request on the basis that Counsel for Local 273 appears to be

using the contents of that unsworn testimony as extra-record evidence upon which to base arguments he makes on brief. This is both contrary to the Department's procedural rules and precedent, and prejudicial<sup>1</sup> to Bay State's rights as the Petitioner in this proceeding.

Bay State also requests that the Department strike Section III.A of Local 273's Brief (pages 5-7) in its entirety. The arguments contained therein are unrelated to the issues presented in this proceeding, rely on facts not in evidence,<sup>2</sup> and rely extensively on the unsworn public hearing testimony presented by a Local 273 member.<sup>3</sup> Local 273's attempt to rely upon this unsworn testimony, which was neither entered into evidence in the evidentiary portion of the proceeding, nor subject to cross-examination by Bay State, simply flies in the face of the Department's long-standing procedural rules and practice. Local 273 provides no citations to evidence in the record or the specific statutes governing this proceeding to support its arguments. Finally, Local 273 resorts to quoting an Order issued in a different state, subject to an entirely different statutory scheme to support its proposed course of action.<sup>4</sup>

In previous decisions, the Department has stated that testimony presented at public hearings which is unsworn "cannot be considered as evidence" in a proceeding.<sup>5</sup> See, e.g., New England Power Company, D.P.U. 92-270, n.5 (1994); New England Power Company, D.P.U. 92-255, n.3 (1994). The contents of Local 273's brief also exceed the scope contained in the Department's procedural rules, 220 C.M.R. 1.11. Further, Local 273's attempt to rely on extra-record evidence is flatly contrary to Department practice and precedent. In numerous instances,

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<sup>1</sup> The procedural schedule does not contemplate submission of reply briefs, thus Bay State has no opportunity to respond.

<sup>2</sup> For example, page 5 characterizes the contents of testimony provided in another D.T.E. proceeding that is not in evidence in this case.

<sup>3</sup> The testimony is unsworn, relies upon facts not in evidence, and addresses numerous aspects of the Bay State and NiSource companies, none of which Mr. Friary has been demonstrated to have direct knowledge of or expertise in.

<sup>4</sup> Bay State notes that the argument concerning extra-record evidence also misconstrues certain pieces of information. Because the Company considers the information to be beyond the scope of the proceeding and is submitting this Motion to Strike, it has not requested the opportunity to correct such mischaracterizations.

the Department has noted its obligation to make determinations in a proceeding “based on record evidence” and, when faced with instances where briefs rely upon extra-record evidence has found “[t]o the extent that any party argued a new position on brief that was unsupported by evidence taken in this proceeding, the Department cannot accept those positions. To the extent that a party attempted to introduce new evidence on brief, that purported evidence is stricken from the record, in compliance with the Department’s procedural rules, prior decisions....” See, MediaOne/Bell-Atlantic, D.T.E. 99-42/43, 99-52 (1999), at 16; See, also, Boston Gas Company, D.P.U. 96-50-C. at 12 (1997)(“Department cannot accord any weight to the arguments put forth by the Company that rely on extra-record information.”); Boston Edison Company, D.P.U./D.T.E. 96-23, at 5 (1998) (granting Motion to Strike brief relying on extra-record evidence and making arguments beyond scope of proceeding, finding disregard for procedures and guidelines governing admission of evidence and submitting briefs not excused even where party lacks legal representation); Boston Edison Company, D.P.U. 92-153 (1993), at 18 n.24 (“because these pages provide a one-sided view not subject to cross-examination and rebuttal, the Department rules that they shall not be admitted into evidence in this proceeding.”); Ara’s Tours, D.P.U. 92-33/52/77 (1993)(“Department precedent and rules pertaining to the admission of evidence require that extra-record material be excluded from the record” citing Boston Edison Company, D.P.U. 90-335 (1992)).

Finally, Bay State submits that Local 273’s attempt to rely upon extra-record evidence and present argument on subjects fully unrelated to the Company’s filing in this case, which is governed by G.L. c. 164, §§ 14, 15, and 16, also contradicts the requirements of G.L. c. 30A, § 11(1), which provides, in pertinent part “[p]arties shall have sufficient notice of the issues

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<sup>5</sup> Nor did Counsel for Local 273 move to enter such evidence into the record.

involved [in an adjudicatory proceeding] to afford them reasonable opportunity to prepare and present evidence and argument.” Previous Department decisions addressing attempts to introduce evidence as part of a brief have appropriately found that such attempts violate Department rules and precedent. In fact, the Department “has strongly criticized the presentation of extra-record evidence to the fact-finder after the record has closed as potentially prejudicial to other parties, even if excluded.” Braintree Electric Light Company, D.P.U. 90-263, at 24 (1991). Thus, Bay State submits that it is both appropriate and necessary to grant its Motion to Strike in this instance, to avoid prejudicing the Company’s rights with respect to the conduct of this proceeding.

### III. CONCLUSION

Wherefore, Bay State Gas Company respectfully requests that the Department grant its Motion to Strike from the record in this proceeding (1) the quoted unsworn testimony presented on page 2 of the Local 273 Brief, and (2) Argument III.A, included on pages 5-7 of the Local 273 Brief, in their entirety.

Respectfully submitted,

BAY STATE GAS COMPANY

By its attorneys,

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